U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11052290

Date: JUNE 30, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner, a software developer and entrepreneur, seeks classification as a member of the professions holding an advanced degree or an individual of exceptional ability in the sciences, arts, or business. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). The Petitioner also seeks a national interest waiver of the job offer requirement that is attached to this EB-2 immigrant classification. *See* section 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i). U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver of the required job offer, and thus of a labor certification, when it is in the national interest to do so.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not show that he qualifies for classification as an individual of exceptional ability or that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
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> (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or

> who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
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> (B) Waiver of job offer –
>
> (i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) defines *exceptional ability in the sciences, arts, or business* as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." In addition, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating eligibility as an individual of exceptional ability. A petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii).

To qualify as a member of the professions holding an advanced degree, the Petitioner must establish that the occupation is a profession, i.e., one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. 8 C.F.R. § 204.5(k)(2). The Petitioner must also submit either:

> (A) An official academic record showing that the beneficiary has a United States advanced degree or a foreign equivalent degree; or
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> (B) An official academic record showing that the beneficiary has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the beneficiary has at least five years of progressive post-baccalaureate experience in the specialty.

8 C.F.R. § 204.5(h)(3)(i).

While neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, USCIS may, as matter of discretion,[1] grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed

[1] *See also Poursina v. USCIS*, 936 F.3d 868 (9th Cir. 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

The first prong, regarding substantial merit and national importance, focuses on the specific endeavor that the foreign national proposes to undertake. The endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact.

The second prong shifts the focus from the proposed endeavor to the foreign national. To determine whether he or she is well positioned to advance the proposed endeavor, we consider factors including, but not limited to: the individual's education, skills, knowledge and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals.

The third prong requires the petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. In performing this analysis, USCIS may evaluate factors such as: whether, in light of the nature of the foreign national's qualifications or the proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, indicate that on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[2]

II. ANALYSIS

The Petitioner claims eligibility both as an individual of exceptional ability and as a member of the professions holding an advanced degree. The Director concluded that the Petitioner had not established the former claim, and made no determination regarding the latter claim. For the reasons explained below, we conclude the Petitioner has not established eligibility for either classification.

A. Exceptional Ability

Under the regulation at 8 C.F.R. § 204.5(k)(3)(ii), a petition for an individual of exceptional ability must include at least three of the following types of evidence pertaining to the Beneficiary:

- (A) A degree or similar award relating to the area of exceptional ability;
- (B) At least ten years of full-time experience in the occupation;
- (C) A license or certification for the profession or occupation;
- (D) A salary or other remuneration which demonstrates exceptional ability;
- (E) Evidence of membership in professional associations; or

[2] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

- (F) Evidence of recognition for achievements and significant contributions.

If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

The Petitioner claimed to satisfy the first, second, fourth, and fifth criteria listed above. The Petitioner also submitted certificates, articles, and other materials as comparable evidence of exceptional ability. The Petitioner did not explain how these materials establish exceptional ability. More fundamentally, the Petitioner did not establish the regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii) do not readily apply to his occupation, as the regulation requires. Rather, the Petitioner claimed to satisfy four of the six criteria, thereby acknowledging their applicability, and did not claim that the other two criteria do not readily apply to his occupation.

The Director determined that the Petitioner had met only the first two criteria, relating to an academic degree and experience in the occupation. On appeal, the Petitioner maintains that he also meets the criterion relating to salary. He does not address the Director's determinations relating membership in professional associations and comparable evidence, and therefore we consider those claims to be abandoned.[3]

The Petitioner's claim of exceptional ability hinges on 8 C.F.R. § 204.5(h)(3)(ii)(D), which requires evidence that he has commanded a salary, or other renumeration for services, which demonstrates exceptional ability.

We note that the Petitioner submits new tax and salary information on appeal. The Director was not able to review this evidence, but we take note of the new submissions because they contain discrepancies and raise other questions that affect their probative value.

The Petitioner initially submitted a Brazilian income tax form for "fiscal year 2018" and "tax year 2017," indicating that [redacted] paid him R$25,200 in taxable income and R$289,489 in non-taxable "[e]arnings from partnership or ownership of small company." (The Petitioner owns 40% of that company.) The form also indicates that the Petitioner's "Main Occupation" is "Officer, president and director of an industrial, commercial or service provider company."

The chief operations officer of [redacted] states that the company paid the Petitioner R$28,500 per month for his work "in the roles of Software Engineer, Project Manager and Business Director" from January 2011 to September 2019.

Brazilian survey data indicates the following salary rates for highly experienced employees at small organizations: system developer, R$4655; software developer, R$5033; business director, R$12,695; and entrepreneur, R$7492.

[3] *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012) (stating that when a filing party fails to appeal an issue addressed in an adverse decision, that issue is waived). *See also Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998); *Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO).

The submitted printouts do not fully specify the context for these figures. For example, the submitted printouts do not specify the interval for the figures (e.g., monthly or annual), and they do not show whether the figures represent the mean, the median, or some other point on the salary range. Furthermore, the figures relate only to small organizations. The submitted survey data shows that large companies may pay more than double some of the figures quoted above.

The Director concluded that the Petitioner had provided incomplete salary information for different occupations, and therefore had not met his burden of proof.

On appeal, the Petitioner's accountant states that the Petitioner earned R$321,700 in 2018 and $R245,872 in 2019, and that the Petitioner's "income is primarily derived from his company [redacted] and his work as an IT/Software Developer." Brazilian tax returns show taxable income of R$21,000 for tax year 2018 and R$25,200 for 2019. The Petitioner does not explain why these annual figures are lower than the R$28,500 monthly figure in the letter submitted previously.

The Petitioner submits survey data from a different source than the other figures quoted above, indicating that the "Average Software Developer Salary in Brazil" is R$59,612, which is more than double the R$25,200 in taxable income shown on his Brazilian tax documents.

Survey data shows that the average U.S. software developer earns $71,446 per year. On his U.S. tax return for 2019, the Petitioner reported $93,000 in income, but more than two-thirds of that amount came from dividends. The return attributes less than $6300 to "wages from Brazil," and less than $24,350 to income from his U.S. company [redacted] The Petitioner does not indicate that any of this U.S. business income was in the form of salary or remuneration for services as a software developer.

The figures the Petitioner provide are inconsistent and combine income from two different sources: salary as a software engineer, and profits he collected as part owner of a business. The Petitioner has not provided any valid basis for comparison between his earnings and those of others with comparable responsibilities. The Petitioner's dividends and profits from owning businesses do not amount to salary paid to a software developer, and it is not accurate to compare his total earnings to the average salary of software developers.

In the absence of reliable, consistent information comparing the Petitioner's salary and remuneration to that of others similarly situated, the Petitioner has not established that his salary and remuneration demonstrate exceptional ability.

B. Member of the Professions Holding an Advanced Degree

Initially, although the Petitioner relied primarily on his claim of exceptional ability, he also claimed, in the alternative, to qualify as a member of the professions holding an advanced degree. The Petitioner did not further pursue this claim in its response to the request for evidence; therefore, the Director did not address that claim in the denial decision. Because the Petitioner revives the claim on appeal, we will address it here. For the reasons discussed below, we conclude that the Petitioner has not established eligibility as a member of the professions holding an advanced degree.

From 2006 to 2008, the Petitioner earned a degree, evaluated as equivalent to a U.S. associate degree, in systems analysis and development from the [redacted] University of [redacted] Brazil. From 2009 to 2011, the Petitioner took "a specialization course in project management" at [redacted] and received a "postgraduate lato-sensu certificate of specialization" (*certificado de especialização).*

The Petitioner has submitted two evaluations, contending that the associate degree and certificate of specialization, taken together, are equivalent to a bachelor's degree. USCIS uses such evaluations as advisory opinions only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988). The first evaluation cites no sources regarding Brazil's education system, and includes the erroneous statement that "an *associate* degree and [*sic*] followed by more than five years of full-time work experience in the field of information technology is equivalent to a Master of Science in Information Systems." The evaluation submitted on appeal cites the website of AACRAO EDGE among its sources. That site states that "*Cursos de Especialização* (specialization programs) . . . are considered *lato sensus* (wide sense graduate-level programs) . . . . Such programs lead toward professional certificates, *not graduate degrees*" (emphasis added).[4] The Petitioner has not established that his certificate of specialization is an academic degree rather than a certificate of occupational training.

The regulations allow for the substitution of a bachelor's degree plus experience in place of a master's degree. There is no further provision for combining lesser degrees and certificates into the equivalent of a master's degree. The Petitioner has not established that he holds any degree that is equivalent to a U.S. baccalaureate degree. Therefore, he has not shown that he qualifies for classification as a member of the professions holding an advanced degree or its defined equivalent.

In light of the above conclusions, the Petitioner has not established eligibility for the underlying immigrant classification. Detailed discussion of the national interest waiver cannot change the outcome of this appeal. Therefore, we reserve this issue.[5]

III. CONCLUSION

For the reasons discussed above, the Petitioner has not established eligibility for classification as a member of the professions holding an advanced degree or as an individual with exceptional ability in the sciences, arts, or business. Therefore, we will dismiss the appeal.

ORDER: The appeal is dismissed.

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[4] Source: https://www.aacrao.org/edge/country/brazil (last visited June 15, 2021). We consider EDGE to be a reliable source of information about foreign credential equivalencies. *See Confluence Intern., Inc. v. Holder*, Civil No. 08-2665 (DSD-JJG), 2009 WL 825793 (D. Minn. Mar. 27, 2009); *Tisco Group, Inc. v. Napolitano*, No. 09-cv-10072, 2010 WL 3464314 (E.D. Mich. Aug. 30, 2010); *Sunshine Rehab Services, Inc.* No. 09-13605, 2010 WL 3325442 (E.D. Mich. Aug. 20, 2010). *See also Viraj, LLC v. Holder*, No. 2:12-CV-00127-RWS, 2013 WL 1943431 (N.D. Ga. May 18, 2013).

[5] *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions unnecessary to the results they reach); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).